IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,

Appellants,

v.

DONALD BRADY, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

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Appellants, William Swisher et al., respectfully pray for either plenary consideration of the questions presented, with briefs on the merits and oral argument, or for summary reversal should the Court conclude that the decision below is clearly in error.

OPINION BELOW

The District Court issued its opinion on September 16, 1977. The opinion has not yet been reported but is reprinted at pages 1a to 18a.

JURISDICTION

On November 25, 1974, Appellees filed suit in the United States District Court for the District of Maryland alleging deprivation of their constitutional rights in violation of the Double Jeopardy Clause of the Fifth

Amendment of the U.S. Constitution as applied to the States through the Fourteenth Amendment. Jurisdiction was alleged under 42 U.S.C. Section 1983. Because an injunction was sought against the operation of portions of Maryland statutes and rules application was made for the convening of three judge district court under 28 U.S.C. Section 2284. On June 2, 1976, argument was heard. Following motions to dismiss supplemental complaints filed by the Appellant, the Appellants' motion was denied after a hearing. The Court filed its opinion on September 16, 1977, and on September 19, issued its final order granting Appellee's declaratory and injunctive relief (See Appendix pp. 1a-18a). Notice of appeal to this Court was filed on October 14, 1974, in the District Court of Maryland. (See Appendix pp. 18a-19a). Jurisdiction is conferred on this Court by 28 U.S.C. Section 1253.

STATUTES INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution is involved. Also involved is the Maryland Juvenile Causes Statute concerning masters in the Juvenile Court; Courts and Judicial Proceedings Article, Section 3-813 and Maryland rules 910 and 911 implementing that statute. These statutory provisions are reprinted at pp. 20a-24a of the Appendix.

QUESTION PRESENTED

Whether the District Court erred in determining that the Appellants are barred by the double jeopardy clause of the Fifth Amendment from taking exceptions to findings and recommendations of a juvenile master in order to obtain a further review on the record by the juvenile judge?

STATEMENT OF THE CASE

For the purposes of this jurisdictional statement the facts relevant to this issue at this stage of the proceedings were concisely summarized by the District Court as follows:

> "A case (in Juvenile Court) is generally instituted when the Office of the State's Attorney files a petition which alleges that the 'Named Child under the age of eighteen years is Delinquent.' If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing[1] is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an exception. Others do not so inform the juvenile. Under Rule 910 the Master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.
>
> Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the

[1] The Appellants except to the use of the word "Adjudicatory" as will be more clearly shown in the argument *infra*.

charge was not sustained and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

THE DISTRICT COURT ERRED IN DETERMINING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO THE STATE'S THROUGH THE FOURTEENTH AMENDMENT BARS THE APPELLANTS FROM TAKING EXCEPTION TO THE FINDINGS AND RECOMMENDATIONS OF THE JUVENILE MASTER IN ORDER TO OBTAIN A FURTHER REVIEW ON THE RECORD BY THE JUVENILE JUDGE.

Since *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056 (1969) the double jeopardy clause of the Fifth Amendment to the Constitution of the United States has been incorporated into the due process clause of the Fourteenth Amendment and is applicable to the States. A number of cases before and since that holding have had occasion to discuss what in the view of the Supreme Court is the exact nature of the protection afforded by the Fifth Amendment. It has recently been held in *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779 (1975) that jeopardy denotes risk and that jeopardy attaches when an individual is put to trial before the trier of facts and further that the double jeopardy clause is written in terms of potential risk of *trial* and conviction, not punishment. *Breed, supra,* 95 S. Ct. at 1787. However, where an individual has not been put to trial before the trier of fact, jeopardy does not attach even though the District Court exercising judicial power and jurisdiction grants a Motion to Dismiss, *Serfass v. U.S.,* 420 U.S. 377, 95 S. Ct. 1055 (1975). Furthermore it

was conceded in *U.S. v. Kysar,* 459 F.2d 422 (10th Cir. 1972) that the double jeopardy clause did not apply to an indictment returned by a Federal Grand Jury after a U.S. Commissioner had dismissed the initial complaint on grounds that the Government had failed to show that a crime had been committed. Lastly it has, of course, been determined that the double jeopardy clause applies to juvenile proceedings, *Breed v. Jones, supra.*

Thus assuming, as we must, that the double jeopardy provisions of the Constitution attach to juvenile delinquency proceedings, a preliminary question must be answered, that is when does jeopardy attach under Rule 910 of the Maryland Rules of Procedure.

The Court of Appeals of Maryland in *Matter of Anderson,* 272 Md. 85 (1974) concluded that in order for jeopardy to attach it must be a proceeding in a court having jurisdiction over both the accused and the offense, *Anderson, supra,* at page 98. The Court also found that under Maryland law an order is not final if further action of the court is required beyond the supervision of the carrying out of the decree, page 100. In line with this, the Court ruled that a master cannot make an adjudication, page 102-103, and that under the provisions of Maryland Constitution, Article IV, Section 1, the judicial power of the State of Maryland is vested in, among other courts, the Circuit Courts and that masters are not judges and, therefore, are not vested with any part of the judicial power of the state, page 105. As an example of this, Judge Smith speaking for the Court of Appeals in *Anderson* cited *Mississippi v. Arkansas,* 415 U.S. 289, 94 S. Ct. 1046 (1974) as an example of when the Supreme Court of the United States itself used a master. Judge Smith pointed out that surely the Supreme Court did not consider itself to be bound by the recommendations and findings of the special master appointed in that case. Nonetheless the Supreme Court itself did not hold any adjudicatory

hearings itself. It is to be remembered that in original actions between states the Supreme Court has original jurisdiction. Accordingly there was no lower tribunal which sat as trier of fact. Thus the only facts before the Supreme Court were those either stipulated to by the parties or found and reported by the special master in the case. The Supreme Court affirmed the master's findings, overruled Arkansas' exceptions to the master's report, confirmed that report, and accepted the master's recommendation for a decree. *Mississippi v. Arkansas, supra,* 94 S. Ct. at 1048. The court then concluded that upon the independent review of the record, the report filed by the master, the exceptions thereto, and the argument thereon the decree would be entered. *Mississippi v. Arkansas, supra,* 94 S. Ct. at 1049. Obviously no one is suggesting, least of all the Supreme Court, that the special master in the instant case was vested with the judicial power of the Supreme Court of the United States, yet he heard facts and assessed the credibility of witnesses. *Mississippi v. Arkansas,* 94 S. Ct. at 1048. Clearly the master was not exercising any judicial power since, of course, he is barred from exercising any judicial power under the provisions of Article 3, Section 1 of the United States Constitution. In *Muskrat v. U.S.,* 219 U.S. 346, 31 S. Ct. 250 (1911) the Supreme Court speaking through Mr. Justice Day stated at page 356:

> "'Judicial power' says Mr. Justice Miller, in his work on the Constitution 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision' Miller, Constitution 314."

Clearly then the Supreme Court is sanctioning the use of masters by federal courts to accept referral of cases from the District Courts for the purposes of finding facts and making recommendations to the

District Court. It is true that such orders of reference are for the moment limited to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure but the language of the Supreme Court in both the majority and dissenting opinions in *Wingo v. Wedding,* 418 U.S. 461, S. Ct. 2842 (1974) clearly indicates that it is merely the statutory and rule proscriptions which prevent further use of masters, including the fact finding hearing under a habeas corpus application. For other cases in which masters were employed see *Oteri v. Calzo,* 145 U.S. 478, 12 S. Ct. 895 (1892); *In Re Peterson,* 253 U.S. 300, 40 S. Ct. 543 (1920); *Phelan v. Middlestate Oil Corporation,* 156 F.2d 697 (2d Cir. 1946); and *United States v. Twin City Power Company,* 248 F.2d 108 (4th Cir. 1957). Despite the fact that a magistrate or a master cannot exercise the ultimate decision making power in a federal court under an order of reference, *T.P.O., Incorporated v. McMillen,* 450 F.2d 348, (7th Cir. 1972); *Campbell v. United States District Court for the Northern District of California,* 501 F.2d 196 (9th Cir., 1974) the federal courts nonetheless:

> ". . . (M)ust give great deference to the judgment of the Master in such cases as this which turn in large part upon the credibility of witnesses and on involved questions of accountancy." *Carter Products, Inc., v. Colgate-Palmolive Company,* 214 F. Supp. 383 (D.C. Md. 1963). Opinion by then Chief Judge Roszel C. Thomsen.

Most relevant to the case before the court is, of course, the recent decision in *Aldridge v. Dean,* 395 F. Supp. 1161 (D.C. Md., 1975) in which Judge Thomsen of this court granted habeas corpus relief to nine petitioners, who are the Appellees in the instant case. The rule in the *Aldridge* case is predicated upon the former provisions of Chapter 900 of the Maryland Rules of Procedure and the former provisions of subtitle 3 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland. Judge Thomsen in his ruling made

certain findings of fact on the record presented to him. In his summation of the chronology of the case he also took note of the fact that the Court of Appeals of Maryland in *Matter of Anderson,* 272 Md. 85 (1974) specifically stated that the master has no authority to exercise judicial power and that the master's findings do not become binding until approved by a judge of the court to which he reports, *Aldridge, supra,* 1168. As a result of his findings under former Chapter 900 Maryland Rules of Procedure, the District Court apparently found three conclusions, (1) that a juvenile is placed in jeopardy when the State begins to offer evidence in an adjudicatory hearing before a master, (2) that whether it be double jeopardy or fundamental fairness once a master has announced a finding of charges not sustained, the State is not permitted to file an exception and obtain a *de novo* adjudicatory hearing, and (3) that the Fourteenth Amendment was violated when, after the master announced his findings, the State filed exceptions and the Petitioners were "put to the task of marshalling (their) resources against those of the State" which resulted in their "twice (being) subjected to the 'heavy personal strain' which such an experience represents." (Citations omitted) *Aldridge, supra,* 1173. It is interesting to note that Judge Thomsen in his opinion stated that aside from the question of the *de novo* hearing provision, the evidence before him indicated that the practice under the Maryland Statute and Rule would nonetheless have been held proper:

> ". . . if the cases are adequately prepared and presented by the State's Attorney, if the record of the proceedings at all adjudicatory hearings is made, if an adequate report is prepared by the master in each case, if an adequate number of judges (whether one or more than one) is available to review the master's report and recommendations,

> and the judge devotes the necessary time to such review and consults with the master when he sees a problem or has any doubt to the proper order. This is shown by the practice in Howard County, as testified to by Judge James MacGill, the Chief Judge and Administrative Judge of the Fifth Judicial Circuit." *Aldridge, supra,* 1173.

Clearly, Judge Thomsen was indicating his belief that even while he was granting habeas corpus relief in *Aldridge* he nonetheless felt that the Maryland rule then extant could be made to work if properly implemented. It is thus submitted that it is not the statute and rule which was unconstitutional in Judge Thomsen's view but rather the procedure thereunder. Accordingly *Aldridge v. Dean* itself is not authority to find the rule and statute in question unconstitutional. To the contrary it would seem that Judge Thomsen's remarks clearly indicate his belief to the contrary upon proper circumstances.

Subsequent to *Aldridge* it is worthy of specific note that the rule as amended permits the State, as before, to take exceptions if a finding of non-delinquency is proposed by a master pursuant to Rule 911 but the State may not have a hearing *de novo* but merely a review on the record. Furthermore the State may only supplement the record by such evidence as the Court considers relevant *and to which the parties raise no objection.* This language is carried over into paragraph C of Rule 911 which permits the trial court to adopt the master's proposed findings of fact, conclusions of law and recommendations or to order a further hearing on the record supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Obviously the rule as now extant does not require the juvenile to undergo a *de novo* hearing unless he himself wishes it. Furthermore it does not allow the juvenile court to consider any further evidence other

than what was presented to the master unless the juvenile requests it or permits it. Still further the provisions of the rule clearly indicate that when reviewing the record the trial court shall have before him the entire file in the case, a written statement of the master's proposed findings of fact, conclusions of law, recommendations and a proposed order. So to Rule 910(a) specifically mandates that all hearings before a master or the court shall be recorded by either stenographic notes or by electronic, mechanical or other appropriate means. Clearly then the trial court also has for its review and perusal the exact transcripts of testimony before the master either in electronic or written form. The juvenile court is than able, from this information presented to him, to make a determination if he wishes as to the merits of the case. He is permitted to require additional evidence if he deems it necessary, if the juvenile does not object, and his adoption of the proposals and recommendations of the master *may* be adopted by the court but under Rule 911(d) those proposals and recommendations are not final action of the court and the discretion is wholly vested in the trial court.

Thus it can be seen that much the same as the federal court system employs the use of masters to gather and present evidence and recommendations to federal tribunals without delegating judicial power thereto, so Maryland does with regard to its juvenile masters under Chapter 900 of the Rules of Procedure, without delegating to them judicial authority. There is no substantial risk of second prosecutions and second fact finding procedures and contrary adjudication, but rather one specific continuing delineated procedure utilizing the master merely as an advisor to the court. There is no improper delegation of power, there is no judicial authority vested in the master and his findings of fact and conclusions of law are not binding on the trial court even if they are stipulated to.

If this Honorable Court finds contrary to the Court of Appeals of Maryland in *Matter of Anderson, supra,* that jeopardy attaches when the master begins the adjudicatory hearing, then it is submitted that jeopardy does not terminate with the submission of the proposed findings and recommendations but rather continues until the trial court is able to make an adjudication. Although the Supreme Court has not expressly adopted a continuing jeopardy doctrine as proposed by Mr. Justice Holmes in his dissent in *Kepner v. U.S.,* 195 U.S. 100, 24 S. Ct. 797 (1904), other courts including the Supreme Court have *implicitly* recognized a continuing jeopardy doctrine envisioned by Mr. Justice Holmes under circumstances where a criminal defendant appeals a verdict of guilty, gains a reversal and is subjected to a retrial on the same charges. See *Price v. Georgia,* 3938 U.S. 323, 90 S. Ct. 1767 (1970); *Ball v. U.S.,* 163 U.S. 662, 16 S. Ct. 1192 (1896); see also *Jones v. Breed,* 497 F.2d 1160, 1167 (9th Cir. 1974). Clearly the nature of the proceeding obviously indicates that the final determination of the case on the merits is not made until the trial court reviews all the evidence, objections and arguments of law appertaining thereto. And the master is not clothed with even a vestige of judicial power under Chapter 900 of the Maryland Rules of Procedure. Accordingly, if this court rules that the master's determination is a final determination for the purposes of concluding the existence of jeopardy, this court will be granting to the master jurisdiction which he does not possess and which he cannot exercise.

The double jeopardy clause of the Fifth Amendment to the United States Constitution as applicable to the states through the Fourteenth Amendment and the due process clause therein is not offended by Chapter 900 of the Maryland Rules of Procedure or subtitle 3 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland.

In the instant case the District Court placed heavy reliance upon *Breed v. Jones, supra,* in determining that the double jeopardy clause was violated when the State took exceptions to the masters' ruling. However, the factual posture in *Breed* is totally different from the present case. While the Appellant readily acknowledges the general principle that the double jeopardy clause applies to juvenile proceedings it does not believe that that principle has been violated in the instant case. In *Breed* the juvenile was charged by petition in the juvenile court with armed robbery. The juvenile court held a "jurisdictional or adjudicatory hearing" during which witnesses for the State and the respondent testified. At the conclusion thereof the Court declared the respondent "unfit for treatment as a juvenile" and ordered that he be prosecuted as an adult. Thereafter, the juvenile was charged in the Superior Court via a criminal information and was eventually convicted. However, in the instant case juvenile proceedings commence in a juvenile court and terminate there. Unlike *Breed* the case is not transferred from the juvenile court to the adult criminal court. The fundamental and crucial distinction between *Breed* and the present case is that the master makes no adjudication. He merely submits his proposed findings and recommendations to the juvenile court judge. If the State wishes to except to those findings and recommendations it may do so but the hearing on those exceptions is on the record of the proceedings before the master unless the juvenile agrees otherwise. Appellant submits that this hearing before the juvenile judge does not therefore constitute a new "risk" and the juvenile is not "put to trial before a trier of the facts" *Breed v. Jones, supra.* The Appellant's position is buttressed by decisions in California and Colorado where officials known as referees perform the functions of the juvenile

master in Maryland. *Bradley v. People,* 65 Calif. Rptr. 570 (1968), *In Re Henley,* 88 Calif. Rptr. 458 (1970), *Jesse W. v. Superior Court of Mateo County,* 133 Calif. Rptr. 870 (1976); *People v. J.A.M.,* 174 Colo. 245 (1971).

CONCLUSION

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal and that the questions presented are substantial. It is respectfully requested that this Honorable Court direct full consideration of the questions presented, with briefing and oral argument. Should the Court conclude that the Lower court decision was clearly in error then it should be summarily reversed.

Respectfully submitted,

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APPENDIX

In The
United States District Court
For The District of Maryland

Donald Brady, et al.,
v.
William Swisher, et al.,

Civil No. Y-74-1291

MEMORANDUM AND ORDER

DATE: 9/16/77

PETER S. SMITH, Esq., Attorney for Plaintiffs, Baltimore, Maryland.

BERNARD RAUM, Esq., Assistant Attorney General, Attorney for Defendants, Baltimore, Maryland.

On November 25, 1974 plaintiffs[1] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton,

[1] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory and injunctive relief, and to enjoin the defendants from subjecting plaintiffs to a second trial or disposition pursuant to Rule 908e 2 and 3, Md. Rules of Procedure, which plaintiffs allege violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. This action is brought pursuant to 42 U.S.C. § 1983 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C. § 2284, plaintiffs filed a request for certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact have been met and that the plaintiffs can adequately represent the interests of the class and are represented by competent counsel, that request is granted. Rule 23(a) (1) F.R.Civ.P. The class is designated as a (b)(2) class under Rule 23 F.R.Civ.P. and consists of all juveniles against whom, on or after June 12, 1976, the State of Maryland had filed exceptions to the finding of non-delinquency. This Court has previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The defendants have moved for relief from this order since the exceptions filed by the State's Attorney's Office were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney has also withdrawn its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before this three-judge panel (June 12, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception. The motion of Eugene Fields to intervene as a plaintiff will be granted. The motion of Meadows to intervene is denied

and the defendants are granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

Pending determination of nine habeas corpus petitions, filed by the original plaintiffs here, the three-judge court stayed consideration of this case. On June 12, 1975 Judge Thomsen granted habeas corpus relief to six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. *See, Aldridge v. Dean,* 395 F. Supp. 1161 (D. Md. 1975).

On July 17, 1975 the defendants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the Maryland legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813, and the Maryland Court of Appeals amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975, as well as the opinion of this Court in *Aldridge v. Dean, supra.* Former Rule 908e 2 and 3 no longer exists, but has been amended and reenacted as Rule 910e, Md. Rules of Procedure. The plaintiffs were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code Cts. & Jud. Proc. Art., § 3-813 and Rule 910e, Md. Rules of Procedure, violate the Double Jeopardy Clause of the Fifth Amendment, and an injunction enjoining the defendants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[2] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813 and Rule 910e. The defendants' motion to dismiss this supplemental complaint was denied after a hearing on the motion.

[2] This Court has granted plaintiffs' motion to substitute Swisher for Allen and Gault-then Mazelis-for Daly. In his complaint, Fields only seeks relief from Swisher, Gault and Daly.

The defendants reasserted their argument that this case should be dismissed on the ground of mootness. However, the intervention of Eugene Fields saves this case from becoming moot. At oral argument it was agreed that the State has filed an exception to the master's findings and recommendations and that a hearing has been set before the juvenile judge on the exception. Thus an actual case and controversy exists between the plaintiff, Eugene Fields, and the defendants.

An evidentiary hearing was conducted in the nine habeas corpus cases (*Aldridge, supra*) at which counsel stipulated that the evidence admitted there would be admissible in this proceeding subject to any objections. This Court conducted a brief evidentiary hearing and counsel have submitted several stipulations and additional documentation. Most of this new evidence brings up to date the statistics introduced in the Aldridge hearing.

A case is generally instituted when the Office of the State's Attorney files a petition which alleges that the "Named child under the age of eighteen years is Delinquent." If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, rape or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an

exception. Others do not so inform the juvenile. Under Rule 910 the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the charge was not sustained and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master.

The legal issue, and only issue, presented in this case is whether the defendants are barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, *see Benton v. Maryland,* 395 U.S. 784 (1969), from taking exceptions to findings and recommendations of a master pursuant to Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813, and Rule 910e, Md. Rules of Procedure, in order to obtain a different resolution by the juvenile judge.

Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813 provides:

> (a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his

appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.

(b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing *de novo* or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

(d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a *de novo* hearing. However, if all parties and the court agree, the hearing may be on the record.

Rule 910e provides:

> Upon the filing of exceptions, the judge shall instruct the clerk to schedule a hearing on the exceptions. A party who files exceptions, other than the State, may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Either hearing shall be limited to those[3] matters to which exceptions have been taken.

Clearly these two provisions conflict. The statute permits a *de novo* hearing if the party taking an exception requests one or if the court, on its own motion, decides not to adopt the master's findings. However, the rule provides that a hearing on exceptions filed by the State must be on the record and not *de novo* unless the juvenile raises no objection. Under Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule-making power of the Maryland Court of Appeals. *See County Fed. S. & L. v. Equitable Sav. & Loan,* 261 Md. 246, 253 (1971). Here both the statute and the rule became effective on July 1, 1975; however, the rule was approved and adopted by the Court of Appeals after the statute was signed into law. At oral argument counsel agreed that the rule controls. Thus this Court need only discuss the provisions of the rule.

Resolution of the legal issue must consider two questions: (1) Whether the adjudicatory hearing before

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[3] Rule 910e was amended, effective January 1, 1977, and the clauses at issue in this case are now incorporated, without substantive changes, in Rule 911c Md. Rules of Procedure, paragraph 2:

> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing de novo or a hearing on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

Reference to the section is made in the remainder of the body of this opinion as Rule 910e [Rule 911c].

the master is a jeopardizing proceeding and (2) If so, whether the proceeding bars any further adjudication by the judge of the Juvenile Court. *See Breed v. Jones,* 421 U.S. 519 (1975); Whitebread & Batey, *Juvenile Double Jeopardy,* 63 Geo. L.J. 857 (1975).

The decisions of the Supreme Court in *Breed* and of Judge Thomsen in *Aldridge* clearly establish that jeopardy attached when the State begins to offer evidence in an adjudicatory hearing before a master. In *Breed* the Court stated:

> We believe it simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years * * *.
>
> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel Marius v. Hess,* [317 U.S. 537] at 548-549. Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens — psychological, physical, and financial — on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense." [Citation omitted.] * * *
>
> Thus in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.'" [Citation omitted.]
>
> * * * We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to

> trial before the trier of facts," [Citation omitted], that is, when the Juvenile Court, as the trier of the facts, began to hear evidence.

Breed v. Jones, 521 U.S. at 529-531. Judge Thomsen, quoting this same language, concluded in *Aldridge* at 1172 "A juvenile is placed in jeopardy when the state begins to offer evidence in an adjudicatory hearing before a master." A similar conclusion was reached in *Brenson v. Havener,* 403 F. Supp. 221 (N.D. Ohio 1975).

Despite these decisions, the defendants, relying on *Matter of Anderson,* 272 Md. 85 (1974), argue that jeopardy does not attach when the State begins to offer evidence in an adjudicatory hearing before a master, but only when the master transmits his recommended findings to the juvenile judge. The Court of Appeals of Maryland in *Matter of Anderson, supra,* stated that the role of a master is only advisory and that a master has no judicial power. Defendants argue that since a master cannot enter a final order in the case, a juvenile is not placed in jeopardy when he appears before the master, thus distinguishing *Breed* where the juvenile originally appeared before a juvenile judge who had the power to enter a final order, if he so chose. The defendants in adopting this argument overlook the clear language in both *Breed* and *Aldridge.* Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and insecurity" in a juvenile and imposes a "heavy personal strain," and the juvenile is put to the task of marshaling his resources against those of the State." *Aldridge* at 1173. The changes in the proceedings before a master, caused by the adoption of Rule 910, [Rule 911] do not alter the conclusion that jeopardy attaches when the State begins to offer evidence before a master in an adjudicatory hearing. That hearing is similar to a court trial in a criminal case. The State first presents its case by calling witnesses who are sworn and subject to cross-examination by the juvenile's counsel. If the juvenile's motion for a directed verdict is denied, then he may put on his case. Clearly jeopardy attaches at such a

proceeding when the State begins to offer evidence before the master, the trier of facts.

Having determined that jeopardy attaches when the master begins to hear evidence, it must next be determined if a juvenile is placed twice in jeopardy when the defendants here take an exception to the findings of a master pursuant to Rule 910e [Rule 911c] In analyzing the constitutionality of the procedures permitted by Rule 910e [Rule 911c], two issues must be considered: (1) Whether "continuing jeopardy" applies to this situation and (2) Whether the rehearing on the record before the juvenile judge is justified by interests of society, reflected in the juvenile court system, or by interests of the juveniles themselves. *See Breed v. Jones, supra*, at 534-535.

Besides the courts in *Aldridge, Brenson* and *Matter of Anderson,* two state courts have faced the application of the Double Jeopardy Clause to review by a juvenile court judge of a master's findings. In *Bradley v. People,* 65 Cal. Rptr. 570 (Ct. App. 1968), the California Court of Appeals, stressing the "conditional nature of a referee's order," found nothing in the applicable provisions of the Juvenile Court Law, permitting a *de novo* review of a referee's order, which offended the Fifth and Fourteenth Amendments. *Bradley* at 575. Later, in following this holding in another case, the California Court of Appeals stressed that in *Bradley* "the determinative factor . . . was the limited nature of the powers of a referee." *In Re Henley,* 88 Cal. Rptr. 458, 561 (Ct. App. 1970).

In *People v. J.A.M.,* 174 Col. 245 (1971) (en banc), the Colorado Supreme Court held that a second hearing before the juvenile judge, following a referee's finding that the evidence was not sufficient to sustain the petition in delinquency, did not place the juvenile twice in jeopardy. The court stated:

> Under the provisions [of the statute], the findings and the recommendations of the referee *do not* have the effect of a final judgment until adopted or modified by the court.

> We are not here dealing with two separate proceedings, one before the referee and a second before the court, but rather with one proceeding to pass on the question of possible delinquency.

People v. J.A.M., supra, at 248-249.

Both cases were decided before the Supreme Court considered *Breed v. Jones* and contain language indicating that the Double Jeopardy Clause did not apply to juvenile proceedings. Thus, in light of *Breed,* these cases might be decided differently today.[4] *Bradley* turns on the theory that jeopardy does not attach at a hearing before a referee; however, this Court, with the advantage of the Supreme Court's language in *Breed,* has already determined that jeopardy does attach at a hearing before a master. The Colorado court's theory of "continuing jeopardy" constituting only one proceeding has been criticized. *See* Whitebread & Batey, *Juvenile*

[4] Since the submission of final briefs in this case, counsel for the defendants has brought to the Court's attention two recent California cases concerned with review by juvenile court judges of referee's decisions. In *Jesse W. v. Superior Court of Mateo County,* 133 Cal. Rpt. 870 (1976), the court persisted in finding, as had the courts in the pre-*Breed* cases, that the subordinate judicial powers of the referees made their determination non-adjudicatory and that therefore there was a "continuing" jurisdiction over a case assumed by the juvenile court judge. "Presiding" power was held not to be the equivalent of "decisional" power. *Jesse W.* does not, in the opinion of this Court, square with the teaching of *Breed*, and the California court's holding that even though jeopardy attached at the referee's hearing it is somehow of less than constitutional magnitude seems to be in error. Counsel for plaintiff in the instant case has informed this Court that *Jesse W.* is on appeal to the Supreme Court of California and thus is of little persuasive value. A second case, *In re Anthony M.,* 64 Cal. App. 3d 464 (1976), does not even cite *Breed* and is clearly concerned with the impact of a juvenile's request for a rehearing, to which he is entitled as a matter of state law in California. Although there is, at 543, general language alluding to the subordinate status of the referee's opinion, the focus of the court's concern is upon the validity of a juvenile court's assessing a more severe penalty upon the rehearing of the juvenile's case.

Double Jeopardy, 63 Geo. L. J. 857, 878 (1975). The same result is unlikely today in light of the statement in *Breed* that ". . . the fact that the proceedings against respondent had not 'run their full course' [Citation omitted], within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." *Breed* at 534. Thus, these cases are of little precedential value to this Court.

Several policies underlie the double jeopardy prohibitation. The policies which most concern this Court now were best stated by Justice Black in *Green v. United States,* 355 U.S. 184, 187-188 (1957).

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * * The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

A third policy relevant here is that the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. *See* Comment, *Twice in Jeopardy,* 75 Yale L. J. 262, 266-67, 277-78 (1965). Here, the defendants can take an exception under Rule 910e [Rule 911c] to a recommended disposition of probation to argue for detention before the juvenile judge.

The defendants have argued that jeopardy does not terminate with the submission of the proposed findings and recommendations by the master to the judge, but rather continues until the trial court is able to make an

adjudication. In the past the concept of "continuing jeopardy" has only been applied in cases in which the defendant has successfully obtained a second trial. *See Jones v. Breed,* 497 F.2d 1160, 1167 (9th Cir. 1974). In recent years the Supreme Court has dealt with double jeopardy cases where the Government has taken an appeal. In *United States v. Wilson,* 420 U.S. 332, (1975), the Government appealed the grant of a postverdict motion for dismissal after the jury had entered a guilty verdict. However, the Third Circuit Court of Appeals barred review of the District Court's ruling on the ground of double jeopardy. The Supreme Court reversed on the ground that the constitutional protection against Government appeals attaches where there is danger of subjecting the defendant to a second trial for the same offense. There was no such danger in *Wilson* because, if the District Court's ruling was overturned, the jury verdict could simply be reinstated. Although the Court permitted the Government to appeal in such situations, the Court stated:

> . . . we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disservice the defendant's legitimate interest in the finality of a verdict of acquittal.

United States v. Wilson, supra at 352.

The same day the Court ruled in *Wilson* it announced its decision in *United States v. Jenkins,* 420 U.S. 358 (1975). There, after a bench trial, the District Court "dismissed" the indictment and "discharged" the respondent. The Second Circuit dismissed the Government's appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further

prosecution." Since the Court was unsure whether the District Court had based its decision on a determination of facts or on a resolution of a legal question, *Wilson* could not govern the case. The Court concluded:

> . . . [I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause . . .

United States v. Jenkins, supra at 370.

Thus the defendants' contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme Court in this context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge. The defendants' argument is basically that under the statutory scheme the hearing before the master and the later review by the juvenile judge are part of one continuing proceeding. The Supreme Court has stated that such an argument "does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." *Breed v. Jones, supra* at 534.

The argument that the hearing before the juvenile judge may only be on the record and not *de novo* does not alter the inescapable conclusion. The most important element is that the State has more than one opportunity to convince a trier of fact of the guilt of the juvenile. In *Jenkins, supra,* the Supreme Court found

that the Double Jeopardy Clause would be violated even if no additional evidence were to be taken by the trial court. *Jenkins* at 370. Interestingly in *Breed* the case in the adult criminal court was "submitted to the court on the transcript of the preliminary hearing." *Breed* at 525. Thus, it is not the taking of additional evidence or the conducting of a *de novo* hearing that violates the Double Jeopardy Clause; it is the subjecting of the juvenile to a second proceeding at which he must once again marshal whatever resources he can against the State's and at which the State is given a second opportunity to obtain a conviction. Merely declaring that the two proceedings are one does not answer these intrusions upon the policies of the Double Jeopardy Clause.

Although Rule 910e [Rule 911c] violates the Double Jeopardy Clause, this Court must consider if giving the juvenile the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile court system. *See Breed v. Jones, supra* at 535. The defendants have offered no explanation of how the master system fosters the flexibility and informality of the juvenile court system. They do assert that if the master system is struck down by this Court that the case load would be too burdensome for the only juvenile judge currently sitting in Baltimore City. The Report of the Committee on Juvenile and Family Law and Procedure to the Maryland Judicial Conference (1976) recommends that the juvenile master system be eliminated and that all juvenile proceedings requiring judicial attention be handled by a juvenile court judge. The Report stated in part: "No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the 'step child' of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal behavior in general to be shunned and ignored as something beneath the dignity of a judge." Thus, the master system not only does not foster any of the goals

of the juvenile court system, it may be a detriment. *See* also Final Report of the Commission on Juvenile Justice to the Governor and the General Assembly of Maryland, January 1, 1977.

Another factor to be considered in deciding whether a constitutional right should be applied to juvenile proceedings is the recommendations of various studies and model acts dealing with the juvenile court system. *See In Re Gault,* 387 U.S. 1 (1967); Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Wm. & Mary L. Rev. 266, 275 (1972).

There are three pieces of model legislation in the area of juvenile law: the *Standard Juvenile Court Act,* prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's bureau (6th Ed. 1959), hereinafter "Standard Act"; the *Uniform Juvenile Court Act,* approved by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter "Uniform Act"; and Model Act for Family Courts and State-Local Children's Programs, prepared by the Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter "Model Act". Section 7 of the Standard Act provides in part, "The judge may direct that any case . . . shall be heard in the first instance by a referee . . . but any party may, upon request, have a hearing before the judge in the first instance." Any party may then file with the judge a request for review of the referee's findings and recommendations. Section 7(b) of the Uniform Act provides: "The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge." Again any party may request a rehearing by the judge. Section 4(b) of the Model Act provides:

> Delinquency and neglect hearings shall be conducted only by a judge if:
>
> (1) The allegations set forth in the neglect or delinquency petition are denied;
>
> (2) The hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or
>
> (3) A party objects to the hearing being held by a referee.
>
> Otherwise, the [judge] may direct that hearings in any case or class of cases shall be conducted by a referee in the manner provided by this (act).

Any party shall receive a hearing if he requests one.

The differences between these model laws and Maryland's statutory scheme are obvious. All the model acts permit any party to have the case heard in the first instance by the judge. Rule 910e [Rule 911c] of the Maryland Rules of Procedure does not permit this right. The Model Act, which is the most recent of the model legislation, also takes away from the referee or master delinquency and neglect hearings if the allegations set forth in the neglect or delinquency petitions are denied. Thus, the master would only hear routine matters that do not require the qualifications of a judge. These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings.

Accordingly, it is this 16th day of September, 1977, by the United States District Court for the District of Maryland, ORDERED:

1. Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge; and

2. Defendants, their agents, employees, persons acting in concert with them, and their successors in-office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

HARRISON L. WINTER
United States Circuit Judge
Name not ledgeable
United States District Judge
Name not ledgeable
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In the United States District Court
For the District of Maryland

Civil Action No. Y-74-1291

Donald Brady, et al.,
Plaintiffs,
v.
William Swisher, et al.,
Defendants.

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1. Notice is hereby given that all Defendants in this action hereby appeal to the Supreme Court of the United States from the final order entered in this action on September 16, 1977, declaring Md. Ann. Code, Courts and Judicial Proceedings Article, Section 3-813 and Rule 910e (Rule 911c) Maryland Rules of Procedure as

unconstitutional under the Double Jeopardy Clause of the Fifth Amendment to U.S. Constitution to the extent that these provisions permit the state to file exceptions (a) to a juvenile court master's findings of non-deliquency and try the juvenile a second time before the juvenile court judge or (b) to a juvenile court master disposition and seek a new disposition before the juvenile court judge and permanently enjoining the Defendants from taking exceptions to findings of non-delinquency or from taking exception to disposition.

2. This appeal is taken pursuant to Title 28, United States Code Section 1253.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland.
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
Attorneys for Appellants.

PROOF OF SERVICE

I, George A. Nilson, Deputy Attorney General, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of October, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Plaintiffs by mailing copies in duly addressed envelopes with first class postage prepaid, to their attorney of record as follows; Peter Smith, Esquire, 500 W. Baltimore Street, Baltimore, Maryland 21201.

GEORGE A. NILSON,
Deputy Attorney General.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life on limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of lie, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 3-813. Masters.

(a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.

(b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

(d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, it all parties and the court agree, the hearing may be on the record. (1975, ch. 554, §§ 1, 3.)

Rule 910. Hearings — Generally.

a. *Before Master or Judge — Proceedings Recorded.*

Hearings shall be conducted before a master or a judge without a jury. Proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

b. *Place of Hearing.*

A hearing may be conducted in open court, in chambers, or elsewhere where appropriate facilities are available. The hearing may be adjourned from time to time and may be conducted out of the presence of all persons except those whose presence is necessary or desirable. If the court finds that it is in the best interest and welfare of the child, his presence may be temporarily excluded except when he is alleged to have committed a delinquent act.

c. *Minimum Five Day Notice of Hearing — Service — Exception.*

Except in the case of a hearing on a petition for continued detention or shelter care pursuant to Rule 912 (Detention or Shelter Care), the clerk shall issue a notice of the time, place and purpose of any hearing scheduled pursuant to the provisions of this Chapter. This notice shall be served on all parties together with a copy of the petition or other pleading if any, in the manner provided by section c of Rule 904 (Duties of Clerk) at least five days prior to the hearing.

d. *Multiple Petitions.*

1. Individual Hearings.

If two or more juvenile petitions are filed against a respondent, hearings on the juvenile petitions may be consolidated or severed as justice may require.

2. Consolidation.

Hearings on juvenile petitions filed against more than one respondent arising out of the same incident or conditions, may be consolidated or severed as justice may require. However, (i) if prejudice may result to any respondent from a consolidation, the hearing on the juvenile petition against him shall be severed and conducted separately; and (ii) if juvenile petitions are filed against a child and an adult, the hearing on the juvenile petition filed against the child shall be severed and conducted separately from the adult proceeding.

e. *Controlling Conduct of Person Before the Court.*

1. *Sua Sponte* or On Application.

The court, upon its own motion or on application of any person, institution, or agency having supervision or custody of, or other interest in a respondent child, may direct, restrain or otherwise control the conduct of any person properly before the court in accordance with the provisions of Section 3-827 of the Courts Article.

2. Other Remedies.

Subtitle P (Contempt) of Chapter 1100 of these Rules is applicable to juvenile causes, and the remedies provided therein are in addition to the procedures and remedies provided by subsection 1 of this section. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)

Rule 911. Masters.

a. *Authority.*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. *Report to the Court.*

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. *Review by Court if Exceptions Filed.*

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served

upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. *Review by Court in Absence of Exceptions.*

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)